

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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EJW

Mailed: March 25, 2015

Cancellation No. 92058411 (parent)
Cancellation No. 92060148

Luxco, Inc.

v.

Opici IP Holdings, LLC

ELIZABETH J. WINTER, INTERLOCUTORY ATTORNEY:

Proceedings Consolidated

On November 6, 2014, Respondent filed a motion to consolidate the above-captioned proceedings on the basis that the parties are the same, Petitioner's pleaded marks are virtually the same, the marks sought to be cancelled are virtually identical, and the goods involved are virtually identical. Petitioner filed a response to Respondent's motion, indicating that it was not opposed to consolidation, as long as such consolidation does not prejudice or limit either party's right to conduct discovery in connection with the later-filed proceeding. At the outset, the Board notes that the pleadings are at issue in both proceedings.

Cancellation Nos. 92058411 and 92060148

The Board may consolidate pending cases that involve common questions of law or fact. *See* Fed. R. Civ. P. 42(a); *see also, Regatta Sport Ltd. v. Telux-Pioneer Inc.*, 20 USPQ2d 1154 (TTAB 1991). Inasmuch as the parties to the respective proceedings are the same, the proceedings involve common questions of law or fact, and the parties' counsel are the same, the Board finds that consolidation of the above-referenced proceedings is appropriate. Consolidation will avoid duplication of effort concerning the factual issues and will thereby avoid unnecessary costs and delays.

In view thereof, Respondent's motion to consolidate is hereby **granted**. Cancellation Nos. 92058411 and 92060148 are hereby consolidated and may be presented on the same record and briefs. The record will be maintained in Cancellation No. 92058411 as the "parent" case. The parties should no longer file separate papers in connection with each proceeding, but file only a single copy of each paper in the parent case. Each paper should bear the numbers of all consolidated proceedings in ascending order, and the parent case should be designated as the parent case by following it with: "(parent)," as in the case caption set forth above.

Consolidated cases do not lose their separate identity because of consolidation. Each proceeding retains its separate character and requires entry of a separate judgment. The decision on the consolidated cases shall take into account any differences in the issues raised by the respective

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pleadings and a copy of the final decision shall be placed in each proceeding file. *See* Wright & Miller, 9A Fed. Prac. & Proc. Civ. § 2382 (3d ed. 2009).

However, the parties are reminded that while discovery in the consolidated proceedings may now move forward, the parties should keep proportionality foremost in mind. The mere fact that proceedings involve multiple marks (whether in a single proceeding, or in consolidated proceedings) does not mean that a party is entitled to serve 75 interrogatories, counting subparts, for each mark, or for each proceeding that has been consolidated. Nor does such fact, in and of itself, constitute good cause for a motion for leave to serve additional interrogatories. *See* TBMP § 405.03(c) (2014). Nonetheless, to avoid any future conflicts between the parties and pre-trial motions regarding the number of interrogatories served in these proceedings, *the parties are allowed to serve on each other no more than 25 additional interrogatories related to the issues involved in Cancellation No. 92060148.*

The parties are instructed to promptly inform the Board of any other related cases within the meaning of Fed. R. Civ. P. 42.

Pending Contested Motions

These cases now come up for consideration of Petitioner's motion (filed September 17, 2014) to compel responses to interrogatories and requests for production of documents and Respondent's motion (filed October 24, 2014) to

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strike, both filed in Cancellation No. 92058411. Both motions are fully briefed.

For purposes of this order, the Board presumes the parties' familiarity with the pleadings and the parties' materials submitted in connection with the referenced motions.

Inasmuch as Respondent's motion to strike relates to Petitioner's reply brief in support of its motion to compel, the Board turns first to the motion to strike.

Respondent's Motion to Strike

Respondent objects to three aspects of Petitioner's reply brief to its motion to compel, arguing that Petitioner raised a new issue regarding the "advice of client" objection in its reply, asks for relief in connection with interrogatory no. 19 for the first time, and set forth other "frivolous" assertions.

When a moving brief, an opposition brief, or a reply brief on a motion has been regularly filed, the Board generally will not strike the brief, or any portion thereof, upon motion by an adverse party that simply objects to the contents thereof. Rather, any objections which an adverse party may have to the contents of such a brief will be considered by the Board in its determination of the original motion, and any portions of the brief that are found by the Board to be improper will be disregarded. TBMP § 517 (2014).

Here, with the exception of Respondent's reference to Interrogatory no. 19, Respondent's motion is essentially a sur-reply to Petitioner's compel reply brief. Sur-replies are not permissible. Trademark Rule 2.127(a). In view of thereof, Respondent's motion to strike is **denied**.

With respect to interrogatory no. 19, when a movant does not ask for relief with respect to a particular discovery request in its motion to compel and that issue is not discussed in the non-movant's response, any request for relief regarding that discovery request which is submitted in the first instance in the movant's reply brief will not be considered. *Cf. Wet Seal Inc. v. FD Mgmt. Inc.*, 82 USPQ2d 1629, 1632 (TTAB 2007) (rebuttal evidence not considered because submission was to strengthen case-in-chief and not for denying, explaining or discrediting adverse party's case). Here, the Board finds that Petitioner's reference to Interrogatory no. 19 is in the nature of a complaint regarding Respondent's asserted lack of cooperation, rather than a specific request for relief (see reply at 7 and note 2; 21 TTABVUE 8). Nonetheless, to the extent Petitioner requests relief regarding interrogatory no. 19, said request will be disregarded; striking Petitioner's discussion of Interrogatory no. 19 is not necessary.

Petitioner's Motion to Compel

- *Parties' Arguments*

Petitioner requests an order compelling Respondent to produce without objection all documents responsive to Petitioner's specifically enumerated

requests for production of documents and to respond completely without objection to certain of Petitioner's interrogatories, both of which were served on April 29, 2014.¹ Specifically, Petitioner contends that Respondent has set forth improper objections to interrogatory nos. 23, 24, and 28, *i.e.*, that its interrogatories are overly broad and unduly burdensome; and that Respondent has improperly refused to respond to interrogatories nos. 23-28 (and corresponding requests for production of documents 32-38) regarding Respondent's counterclaims. Petitioner also objects to Respondent's objection to all of the identified interrogatories that responsive information is subject to the attorney-client privilege and/or the attorney work product doctrine. Petitioner argues that the requested information itself is not privileged and that Respondent has not explained why its interrogatories are overly broad and unduly burdensome. Additionally, insofar as Petitioner sought to resolve Respondent's objections by serving a revised set of interrogatories on Respondent and Respondent has objected to such service, Petitioner argues, *inter alia*, that Respondent waived its objection that Petitioner's interrogatories exceeded the number allowed under Trademark Rule 2.120(d)(1) when it responded initially without objecting to the number of interrogatories.

Petitioner also seeks responses to requests for production of documents nos. 6, 32, 33-35, and 38, and 7, 10, 12-13, and 31, some of which relate to

¹ Petitioner agreed to a thirty-day extension of time for Respondent to respond to Petitioner's discovery, that is, until July 2, 2014.

Respondent's now dismissed counterclaims. Specifically, Petitioner objects to Respondent's objection that certain documents are "subject to the attorney-client privilege and/or the attorney work product privilege," and that Respondent need not respond to discovery requests related to the dismissed counterclaims. Petitioner also requests that Respondent be compelled to produce all responsive, non-privileged documents to Petitioner's document requests, in particular those documents that were identified in Respondent's initial disclosures as being within Respondent's "possession, custody or control." Additionally, Petitioner requests that Respondent be ordered to produce a supplemental privilege log, which adequately describes the nature of any documents, communications or tangible things in a manner that actually allows Petitioner to assess the veracity of Respondent's claims, *i.e.*, that the documents not produced constitute communications related to a request for legal advice. Finally, Petitioner requests that the Board further order that if Respondent violates any portion of the compel order that it will be precluded from relying on any such information or documents at trial. In support of its motion, Petitioner has provided copies of its correspondence (written and by email) to Respondent's counsel regarding the discovery dispute, along with copies of the discovery at issue.

In response, as regards Petitioner's interrogatories, Respondent first argues that it has already served its responses to Petitioner's first set of interrogatories, therefore, it is improper for Petitioner to serve new ones; that

in any event, Petitioner has exceeded the limit of 75 interrogatories, therefore, additional interrogatories should not be served; that Petitioner failed to make a good faith effort to resolve any issues regarding the interrogatories because it failed to provide its counting method to Respondent so that the parties could reach an understanding; that Petitioner has failed to include its counting method for the Board's consideration; and that Petitioner is asking the Board for an advisory opinion in connection with its proposal to serve revised interrogatories. Respondent also contends that its amended responses to interrogatory nos. 23, 24, 26, 27 and 28 are sufficient.

With respect to Petitioner's requests for production of documents, Respondent states as follows:

- As to document request no. 6, Respondent asserts that it has no documents that are not protected by the attorney-client privilege because information from its informal searches is embedded in its attorneys' correspondence to Respondent;
- As to document request no. 7, which pertains to the development, creation and/or adoption of Respondent's mark, Respondent claims that but for the drawing board rendition of the product label for REBELLION bourbon provided to Petitioner, all other documents are protected by attorney-client privilege, including the search report combined with its attorneys' comments and opinions.

- Regarding document request nos. 10 and 12-13, Respondent asserts that it has provided representative documents in response to request no. 10 and that it has responded to request nos. 12-13.
- Regarding document request no. 31, Respondent states that its collection of third-party use materials, reference works on the Whisky Rebellion, and dictionary definitions are protected by the attorney work product privilege and have occurred after the commencement of this proceeding and, therefore, do not need to be produced. Further, Respondent opines that it does not have to produce a privilege log for such materials (occurring after commencement of the proceeding).
- As document request nos. 23, 24, 26, 27 and 28 regarding “third party uses, etc. prior to commencement,” Respondent states that its various search results were not downloaded or saved in any manner (see 20 TTABVUE 15 and Rannell’s dec., Exh. 9).
- As to document requests nos. 32-35 and 38, Respondent states that the documents it relied on to support its contentions of abandonment, naked licensing, failure to police, and failure to challenge third party uses were not downloaded or saved; accordingly, other than attorney-client privileged emails involving the results of its searches for said documents, there are no documents to produce. Further, to the extent it did save any search results, those documents were attached to

Respondent's requests for admissions as exhibits thereto, thus, are already in the hands of Petitioner.

- Regarding its privilege log, Respondent states that it served on September 26, 2014, an amended/revised privilege log on Petitioner, which should resolve Petitioner's concerns.

In reply, Petitioner asserts that Respondent has not complied with the independent requirement under Fed. R. Civ. P. 34 to produce documents responsive to document requests nos. 32-25 and 38, arguing that the fact that Respondent attached TTB Certificates of Label Approval ("COLA") and third party trademark registrations to its requests for admission served on Petitioner is inadequate production. Additionally, Petitioner argues, *inter alia*, that Respondent has not justified not producing the documents mentioned in its initial disclosures and that Respondent is unjustifiably hiding discoverable information behind the attorney-work product doctrine. In particular, Petitioner contends that Respondent has waived the attorney-client privilege as to communications related to the adoption, registration and use of Respondent's trademark and, therefore, Respondent should be ordered to respond to production request nos. 6, 31-35, and 38, or be precluded from using any such documents at trial. Moreover, regarding request no. 7, Petitioner states that Respondent testified that it did receive a search report from counsel on July 20, 2010; however, Respondent has failed to produce the report or the opinion, or any other documents related to the

development or creation of its mark. Petitioner requests that the Board order Respondent to produce the search results without objection or confirm that it has no additional documents. As regards Petitioner's interrogatories, Petitioner argues again that Respondent has waived the attorney-client privilege and work product protection as to responsive information and documents related thereto inasmuch as Respondent states that it has relied on "advice-of-counsel." Petitioner also requests that the Board review *in camera* Respondent's search documents and those documents identified in Respondent's supplemental privilege log to determine whether they have been properly withheld.

- ***Decision***

As a threshold matter, in view of the several letters and emails from Petitioner's counsel to Respondent's counsel concerning the instant discovery dispute (see, e.g., July 8, 2014 letter from Attorney Gilfoil to Attorney Baker, 17 TTABVUE 2; July 23, 2014 email from Attorney Gilfoil to Attorney Baker, 17 TTABVUE 18; August 12, 2014 email from Attorney Gilfoil to Attorney Baker, 17 TTABVUE 27; and August 21, 2014 email from Attorney Gilfoil to Attorney Baker, 17 TTABVUE 21), the Board finds that Petitioner made a good faith effort to resolve its discovery concerns with Respondent prior to filing the subject motion. *See* Trademark Rule 2.120(e)(1).

Regarding Petitioner's requests for relief, the Board issues the following summary orders:

○ *Interrogatories*

At the outset, the Board finds that the parties' dispute regarding the number of interrogatories served is moot. Respondent responded to Petitioner's interrogatories without objection to the number served; therefore, any objection regarding the number served is waived. See Trademark Rule 2.120(d)(1).

1. With respect to Petitioner's interrogatory nos. 23 and 24, Petitioner's motion to compel is **denied**. Respondent's counterclaims have been dismissed; therefore, the scope of discovery no longer includes information specifically related to those claims. See Fed. R. Civ. P. 26(b)(1).
2. Inasmuch as interrogatory no. 25 repeats no. 24, there is also no need for Respondent to respond thereto.
3. With regard to Petitioner's interrogatory no. 26, Petitioner requests that Respondent state all facts that Respondent relied on to support Respondent's second affirmative defense. Respondent's amended answer to Interrogatory No. 26 (20 TTABVUE 118) is acceptable; therefore, the motion to compel is **denied** with respect thereto.
4. With regard to Petitioner's interrogatory no. 27, Petitioner requests that Respondent state all facts that Respondent relied on to support Respondent's third affirmative defense. Respondent's amended answer

to Interrogatory No. 27 (20 TTABVUE 119) is acceptable; therefore, the motion to compel is **denied** with respect thereto.

5. As regards interrogatory no. 28, Petitioner requests that Respondent state all facts that Respondent relied on to support Respondent's fourth affirmative defense.² Respondent states in its supplemental response that it "relied upon the advice of counsel." Respondent also describes the subject matter and method of its counsel's informal searches, stating that the results "were not downloaded or saved in any way."

Respondent's fourth affirmative defense was stricken in the Board's order mailed on July 29, 2014 (see order at 11 TTABVUE 6). In view thereof, the scope of discovery no longer includes information specifically related to that defense. *See* Fed. R. Civ. P. 26(b)(1). Furthermore, even if the affirmative defense were still at issue in this proceeding, Respondent did not invoke in its response the "advice of counsel" defense, as argued by Petitioner. For the sake of completeness, the Board will address this issue

The law in the Federal Circuit is well established that a litigant who asserts reliance of the advice of counsel *as a defense* may waive the attorney-client privilege with regard to certain communications

² That the petition is barred by Petitioner's failure to challenge the use of Rebel and/or Rebellion marks on related goods and services by unrelated third parties.

pertaining to that advice. *See In re Seagate Tech., LLC*, 497 F.3d 1360, 1370, 83 USPQ2d 1865, 1873 (Fed.Cir. 2007) (*en banc*) (*cert. denied*, 552 U.S. 1230 (2008)); *In re EchoStar Communications Corp.*, 448 F.3d 1294, 1299, 78 USPQ2d 1676, 1683 (Fed.Cir. 2006) (*cert. denied*, 549 U.S. 1096 (2006)). A party places an attorney's advice at issue when "the client asserts a claim or defense, and attempts to *prove* that claim or defense by disclosing or describing an attorney client communication." *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir.1994) (emphasis added). In the willful infringement context, infringers often assert the advice of counsel defense "to establish that due to reasonable reliance on advice from counsel, its continued accused activities were done in good faith." *Seagate*, 497 F.3d at 1369. *See also Brigham and Women's Hosp. Inc. v. Teva Pharmaceuticals USA, Inc.*, 707 F.Supp.2d 463, 471 (D.Del. 2010) (Plaintiffs waived the attorney client privilege insofar as they attempted to use the advice of counsel both as a sword to defeat the intent prong of inequitable conduct and as a shield to prevent defendants from obtaining information to prove intent to withhold information from the PTO.).

Here, Respondent's reference to "the advice of counsel" merely means that Respondent asserted its fourth affirmative defense on the advice of counsel. Said differently, Respondent is not stating by its

response that it committed a particular act, e.g., filed its trademark application or used its trademark in good faith, based on the advice of its counsel. In view thereof, the Board finds that Respondent did not assert the “advice of counsel” defense for conduct which would effectuate a waiver of attorney/client privilege. Therefore, Respondent has not waived its attorney/client privilege with respect to information and documents related to its stricken fourth affirmative defense.

Finally, in any event, Petitioner is not entitled to receive “all facts” in support of Respondent’s affirmative defense. *See Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1657 (TTAB 2002) (interrogatory requesting that opposer “identify each and every fact, document and witness in support of its pleaded allegations” was equivalent to a request for identification of fact witnesses and trial evidence prior to trial, and therefore improper). Accordingly, for the foregoing reasons, Petitioner’s motion to compel is **denied** in connection with interrogatory no. 28.

○ ***Requests for Production of Documents***

At the outset, except as discussed *infra*, the Board finds that Respondent’s amended or supplemental privilege log served on September 26, 2014, is acceptable. *See Red Wing Co. v. J. M. Smucker Co.*, 59 USPQ2d 1861, 1864 n.5 (TTAB 2001) (party making claim of privilege must do so expressly and otherwise describe the nature of the withheld information in a manner

enabling the other party to assess the applicability of the claim of privilege without disclosing the privileged information itself).

1. Regarding request for production no. 6 by which Petitioner seeks trademark searches conducted for or on behalf of Respondent for the mark REBELLION, Respondent has objected to this request on the grounds that the documents are protected by the attorney-client privilege or attorney-work product. In its brief, Respondent explains that the informal search results are referenced in the attorney's correspondence to Respondent, and thus, the entirety of the search results may not be divulged to opposing counsel.

Petitioner's motion to compel is **denied** as to request no. 6. Under these circumstances, the correspondence embedded with search results is privileged and is not discoverable. *Amerace Corp. v. USM Corp.*, 183 USPQ 506, 507 (TTAB 1974) (attorney comments on search report or prosecution of application are privileged).

2. Regarding request for production nos. 32-35 and no. 38, Respondent states that there are no documents to produce other than "attorney-client privileged emails." Petitioner's motion to compel is **denied** because these requests relate to Respondent's dismissed counterclaims and stricken affirmative defense. Therefore, as explained *supra*, such information is no longer within the scope of discovery. *See* Fed. R. Civ. P. 26(b)(1).

3. Petitioner requests in request no. 7 that Respondent produce those documents that pertain to the development, creation, and/or adoption of the REBELLION mark. Respondent states that “relevant representative documents will be made available for inspection and copying.” Respondent has produced a single document in response to this request. Petitioner’s motion to compel is **denied**. See *Washington v. Garrett*, 10 F.3d 1421, 1437-38 (9th Cir. 1993) (Where information responsive to an interrogatory is not available, the responding party is not required to speculate; likewise, where documents responsive to a request for production do not exist, the responding party is not obligated to create them.). However, **Respondent must state that it has no other non-privileged responsive documents** pertaining to the development, creation, and/or adoption of the REBELLION mark.
4. Petitioner requests in request no. 10 that Respondent produce representative documents evidencing those goods/services under which the REBELLION mark is currently used or is intended to be used. Respondent’s documents provided in response to this request are sufficient (see Exh. 6, dec. of John M. Rannells ¶8, 20 TTABVue 19, 47-66). In view thereof, Petitioner’s motion to compel is **denied** with respect to request no. 10. However, **Respondent must state that it has no other non-privileged responsive documents** pertaining to this request.

5. Petitioner requested in request nos. 12 and 13, respectively, examples of any tags or labels used by Respondent or its licensees in connection with the offer or sale of goods bearing the REBELLION mark and a sample of the complete packaging for the goods sold or intended to be sold under the REBELLION mark. Respondent's documents provided in response to these requests are sufficient (see Exh. 6, dec. of John M. Rannells ¶8, 20 TTABVUE 19, 47-66). In view thereof, Petitioner's motion to compel is **denied** with respect to request nos. 10 and 12. However, **Respondent must state that it has no other non-privileged responsive documents** pertaining to these requests.
6. By request no. 31, Petitioner seeks all documents and materials referred to in Respondent's initial disclosures and now seeks, in particular, the following:
 - a. internet materials concerning third party uses of the term REBEL and variations thereof,
 - b. uses by third parties of products bearing the term REBEL and variations thereof,
 - c. USPTO records of third party applications and registrations that include the term REBEL or variations thereof,
 - d. TTB (COLA) LABEL approvals concerning labels bearing the term REBEL or variations thereof,
 - e. materials concerning the Whiskey Rebellion, and

f. dictionary definitions of and other reference materials concerning the meaning and/or commercial impression of the terms REBEL and REBELLION.

As noted *supra*, Respondent asserts that the documents related to its collection of third party materials (§§a-d, above), reference works on the Whisky Rebellion (§e, above), and dictionary definitions (§f, above) are protected by attorney work product privilege because they were collected after the commencement of the proceeding and, further, that said documents do not have to be recorded in a privilege log (for the same reason).

“The work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client’s case.” *U.S. v. Nobles*, 422 U.S. 225, 238 (1975), (cited in *In re EchoStar Comm. Corp.*, 78 USPQ2d at 1681 (“Work product immunity protects ‘the attorney’s thought processes and legal recommendations’ from the prying eyes of his or her opponent.”)). The work-product doctrine encourages attorneys to write down their thoughts and opinions with the knowledge that their opponents will not rob them of the fruits of their labor. *Hickman v. Taylor*, 329 U.S. 495, 511 (1947)). The rule requires the Court to “protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney” concerning the litigation. Fed. R. Civ. P.

26(b)(3). However, work product protection does not extend to documents in an attorney's possession that were prepared by others in the ordinary course of business and not in anticipation of litigation. *See Procter & Gamble Co. v. Ultreo, Inc.*, 574 F.Supp.2d 334, 336-37 (S.D.N.Y. 2008).

In the first instance, the Board fails to see how the documents sought by Petitioner constitute attorney work product. Reference materials and dictionary definitions are created by third parties in the ordinary course of business. The mere fact that counsel or a staff member gathered those materials after litigation commenced does not mean that those materials are protected by the attorney work product doctrine. Respondent's reference materials on the Whisky Rebellion and the term "rebellion" and dictionary definitions of "rebellion" of that term (§§e-f, *supra*) are likely to be publicly available materials, which are frequently submitted with a notice of reliance under Trademark Rule 2.122(e).

As to the materials indicating third-party use of REBEL formative marks, information concerning a party's awareness of third-party use and/or registration of the same or similar marks for the same or closely related goods or services as an involved mark (such as in §§a-d, *supra*), is discoverable to the extent that the responding party has actual knowledge thereof (without performing an investigation) and that the

information appears to be reasonably calculated to lead to the discovery of admissible evidence. TBMP § 414(9) (2014). *See also American Society of Oral Surgeons v. American College of Oral & Maxillofacial Surgeons*, 201 USPQ 531, 533 (TTAB 1979) (relevant to show mark is weak); and *Domino's Pizza Inc. v. Little Caesar Enterprises Inc.*, 7 USPQ2d 1359, 1363 n.9 (TTAB 1988) (relevant to show purchaser perception of the marks). For these reasons, Respondent's argument that the foregoing materials are protected under the attorney work product doctrine is not persuasive.

However, even if the materials regarding third party use of the marks REBELLION or REBEL did constitute attorney work product, Respondent waived said protection by providing copies of those materials along with its requests for admission served on Petitioner. *In re EchoStar Communications Corp.*, 78 USPQ2d at 1681 (protection of "factual" or "non-opinion" work product may be waived by disclosure) (internal citations omitted). Accordingly, as regards Petitioner's motion to compel responses to document request no. 31, said motion is **granted**. Respondent is allowed until **APRIL 15, 2015**, to serve on Petitioner's counsel copies of documents and materials responsive to production request no. 31.

Finally, to the extent Petitioner requests that the Board order that Respondent will be precluded from relying on any information or documents at

trial which are not produced herein, said request is premature. Nonetheless, Respondent is reminded that an evasive or incomplete response is the equivalent of a failure to disclose. *See* Fed. R. Civ. P. 37(a)(4); Trademark Rule 2.116(a). Further, should a party, due to an incomplete search of its records, provide an incomplete response to a discovery request, it may not thereafter rely at trial on information from its records which was properly sought in the discovery request but was not included in the response thereto, unless the response is supplemented in a timely fashion pursuant to Fed. R. Civ. P. 26(e). *See Panda Travel, Inc. v. Resort Option Enterprises, Inc.*, 94 USPQ2d 1789, 1791 (TTAB 2009); *Bison Corp. v. Perfecta Chemie B.V.*, 4 USPQ2d 1718, 1720 (TTAB 1987). *See also* TBMP § 527.01(e) (“Estoppel Sanction”).

Respondent is also reminded of its *continuing duty* to thoroughly search its records for all information properly sought in discovery, and to provide supplementary information to Petitioner. TBMP §§ 408.01 and 408.02. Further, a party that has responded to a request for discovery remains under a *continuing duty* to supplement or correct the response to include information thereafter acquired or uncovered. *Id.* at § 408.03.

Should Respondent not comply with the Board’s orders herein, Petitioner may seek appropriate sanctions. *See* Trademark Rule 2.120(g); and TBMP §§ 411.04 and 527.01 (2014).

Proceedings Resumed; Trial Dates Reset

These proceedings are resumed. Respondent is allowed until **APRIL 15, 2015**, to serve responses and supplemental information on Petitioner, as ordered herein. Trial dates are reset as shown in the following schedule:

Expert Disclosures Due	6/23/2015
Discovery Closes	7/23/2015
Plaintiff's Pretrial Disclosures Due	9/6/2015
Plaintiff's 30-day Trial Period Ends	10/21/2015
Defendant's Pretrial Disclosures Due	11/5/2015
Defendant's 30-day Trial Period Ends	12/20/2015
Plaintiff's Rebuttal Disclosures Due	1/4/2016
Plaintiff's 15-day Rebuttal Period Ends	2/3/2016

IN EACH INSTANCE, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party **WITHIN THIRTY DAYS** after completion of the taking of testimony. See Trademark Rule 2.125, 37 C.F.R. § 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b), 37 C.F.R. §§ 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129, 37 C.F.R. § 2.129.

